UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 22

1621 ROUTE 22 WEST OPERATING COMPANY, LLC D/B/A SOMERSET VALLEY REHABILITATION AND NURSING CENTER

and

Case Nos. 22-CA-29599 22-CA-29628

1199 SEIU UNITED HEATLHCARE WORKERS EAST, NEW JERSEY REGION

> 1621 ROUTE 22 WEST OPERATING COMPANY, LLC D/B/A SOMERSET VALLEY REHABILITATION AND NURSING CENTER'S RESPONSE TO REGION 22'S MEMORANDUM IN OPPOSITION TO THE EMPLOYER'S PETITION TO REVOKE SUBPOENA DUCES TECUM

The Employer, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, ("Somerset Valley," the "Employer," or the "Company") files this Response to Region 22's Memorandum in Opposition to the Employer's Petition to Revoke Subpoena Duces Tecum No. B-612289 and states as follows:

On November 18, 2010, Somerset Valley submitted a Statement of Position to Region 22 in response to allegations by 1199 United Healthcare Workers East, Service Employees International Union ("Union"), contained in NLRB Case No. 22-CA-29599 and NLRB Case No. 22-CA-29628, submitting with its Statement of Position a number of relevant documents requested by the Region in its investigation. Thereafter, on November 26, 2010, the day after

¹ The Memorandum filed by Region 22 contains certain factual inaccuracies and/or misstatements of fact. Accordingly, a response by Somerset Valley is necessary to correct certain factual inaccuracies presented to the National Labor Relations Board. This Response is not intended to be a complete summary of any facts or the Employer's position in this matter and the Employer incorporates herein its objections to the Subpoena as stated in its Petition to Revoke.

Thanksgiving, the Employer received Subpoena Duces Tecum No. B-612289 issued by Region 22 requesting production of an extensive number of documents, some of which encompassed documents that were wholly irrelevant and/or immaterial to the allegations in the Charges or had no bearing on the disputed issues. Several of the enumerated requests used broad, vague and sweeping terminology, such that it was not possible to ascertain or identify the documents for which the Region sought production.² Accordingly, the Region's contention that its requests are limited in scope is without merit.

In the initial paragraph in its Memorandum, the Region states that the Employer petitioned to revoke the subpoena, but fails to acknowledge that the Employer substantially complied with the subpoena and only sought to revoke those portions of the subpoena that were overly broad, unduly burdensome, not relevant, privileged, proprietary, encompassing confidential patient information, or so vague and ambiguous as to make it impossible for the Employer to ascertain the information allegedly sought by the Region.

In fact, only one week after the subpoena was received, on December 3, 2010, the Employer produced over 4,000 pages of documents responsive to the subpoena. Specifically, the Employer produced the complete personnel files for the alleged discriminates and any other employees who were discharged during the requested time period, daily staffing sheets, daily payroll reports and daily schedules for 2010,³ records and other documents showing all disciplinary action issued to Somerset Valley employees for the requested period, the Company's

² As discussed in further detail herein, a number of the requests sought records "and other documents that refer and/or relate in any way" to the requested information. These requests are vague and overly broad such that it not only is impossible for the Employer to identify the information requested, but compliance would mandate production of wholly irrelevant information that may in some way tangentially relate to the request, yet not actually demonstrate the information sought in any meaningful way.

³ The documents produced were from January 1, 2010 through the time of production to the Region.

employee handbook, and any requested personnel action forms documenting status changes from per diem to part-time and/or full-time employment status for the requested period.

The Employer's production of documents in response to the subpoena substantially complied with the Region's request for information and directly addressed the disputed issues. The information produced by the Employer is the best, most responsive, evidence to the Region's requests. To the extent other documents may exist that somehow might reflect a portion of the information sought, those documents are duplicative, too burdensome to produce, possibly contain confidential patient information protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or other privileged data, or are otherwise not relevant to the allegations in the pending Charges. By way of example, a patient's Treatment Administration Record (TAR) or Medication Administration Record (MAR) might show that a per diem employee worked on a given day as that employee's initials would appear on the patient's chart indicating treatment was rendered or medication was administered. document, however, is largely non-relevant and only provides information duplicative of that already reflected in clearer detail on the daily staffing sheet, daily schedule, and payroll records for that time period. Furthermore, production of all patient charts and documents of this nature would be unduly burdensome to the Employer in addition to requiring the Employer to disclose confidential, protected information.

In response to the requests in paragraphs numbered 1 through 6, the employer produced the personnel action forms of those employees whose status changed from per diem to part-time and/or full-time employment status, as well as employee schedules, staffing sheets, and payroll records for the requested time period. These documents provide the most complete and accurate information directly responsive to the subpoena request. Any other documents that may reflect

this information would be duplicative and non-relevant as the documents produced best address the information requested and encompass the affected employees.

Moreover, the Employer denies that it discontinued the use of per diem employees. Any assertions to the contrary are simply untrue. The Employer informed the Region in its Statement of Position that per diem employees are not guaranteed any hours on the schedule and the nature of the per diem position is that those individuals have irregular work hours. Following the termination of nursing scheduler Valerie Wells (for job performance issues), it was learned that, at times, per diem employees were mistakenly used in lieu of available, regular full-time and part-time nurses on the schedule. However, it is the Employer's practice to limit the use of per diem nurses for better consistency of patient care and to control costs. Thus, following Wells' departure, per diem nurses were sometimes used less frequently based on the availability of fulltime and part-time employees. Per diem nurses continue to be scheduled as needed to fill in where regular full-time and part-time nurses are unavailable. Contrary to the Region's assertion, the Employer did *not* "eliminate[] part-time and per diem employees to streamline staff costs and redundancy in Somerset Valley's operations." Nonetheless, the Employer has produced payroll records, daily staffing sheets, and schedules for 2010. These documents reflect the best evidence of staffing of employees and include the relevant information sought in the Region's request.

The Region's request regarding Paragraph 9 is unclear and seemingly overly broad. The original request seeks "records and other documents gathered or generated by the Employer that refer and/or in any way relate" to the Union's campaign. In its Memorandum, however, the Region appears to limit its request by stating that the request is relevant to the Employer's motivation for its actions and the extent and timing of the Employer's knowledge of the

protected activities of employees. Thus, it is unclear whether the Region is only seeking documents related to the Employer's knowledge of employees' protected, concerted activities or seeking any documents gathered or generated by the Employer relating to the Union's campaign. Accordingly, such requests are vague, unduly burdensome, and overly broad. Moreover, because the request is not clear, the subpoena seeks documents that are wholly irrelevant and/or immaterial to the allegations in the Charges. Paragraph 10 also is overly broad, to the extent that it encompasses information not relevant to the allegations in the pending charges. Further, such documents may contain privileged information related to the pending matters.

With regard to Paragraph 11 seeking all audio and visual recordings of meetings or other activity related to the Union's organizing drive, the Employer denies that it recorded any meetings with employees or recorded any other activity related to the Union's organizing drive and is not aware of any such documents. Moreover, the Employer denies that it held mandatory meetings with employees to inquire about problems at the facility. Furthermore, the Region relates Paragraph 12 to Paragraph 11 in its Memorandum, but these Paragraphs appear to be unrelated. Additionally, Paragraph 12 seeks documents that are entirely unrelated to any allegations in the pending Charges. Paragraph 12 seeks summaries or materials used by the Employer during mandatory meetings with employees, yet there has been no allegation that any meeting content with any employees was violative of the Act.

Finally, the Region's request regarding paragraph number 13 requesting *all* work rules, policies, practices and procedures that are applicable to employees is vague, ambiguous, oppressive, unduly burdensome, and overly broad. As stated in its Petition to Revoke, there are a vast number of clinical policies, practices, and standards that apply to employees in the clinical practice. The overwhelming majority of these policies are wholly irrelevant and/or immaterial to

the allegations in these Charges and have no bearing on the disputed issues. The Region's argument that such a request is limited in scope is without merit and such request should be sufficiently tailored to allow for production of meaningful information.

For the foregoing reasons, the Subpoena Duces Tecum No. B-612289 is defective in part and, therefore, should be revoked in part as set forth above and in Somerset Valley's Petition to Revoke.

Respectfully submitted,

JONATHAN E. KAPLAN TANJAL. THOMPSON

KIESEWETTER WISE KAPLAN

PRATHER, PLC

3725 Champion Hills Drive, Suite 3000

Memphis, Tennessee 38125

(901) 795-6695

ATTORNEYS FOR SOMERSET VALLEY REHABILITATION & NURSING CENTER

CERTIFICATE OF SERVICE

The undersigned certifies that on the <u>26th</u> day of January, 2011, the foregoing pleading was filed via electronic filing and emailed to the Region.

Tanja L. Thompson